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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

JUAN FLORES-MENDEZ, an individual and  
AMBER COLLINS, an individual, and on  
behalf of classes of similarly situated  
individuals.

## Plaintiffs,

V.

ZOOSK, INC., a Delaware corporation; and  
SPARK NETWORKS SE, a German  
corporation,

## Defendants.

**CASE NO: 4:20-cv-04929-SBA  
[Assigned to Hon. William H. Alsup, CR 12]**

**STIPULATION PURSUANT  
TO FEDERAL RULE OF EVIDENCE  
502(d)**

Complaint filed July 22, 2020

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The Plaintiffs and Defendants to this litigation, by and through their respective counsel, have jointly stipulated to the terms of the Rule 502(d) Order, and with the Court being fully advised as to the same, it is hereby ORDERED:

### A. Applicability

1. This Order shall be applicable to any privileged or otherwise protected or exempted communication or information disclosed in connection with this proceeding (whether contained in deposition transcripts and/or videotapes, testimony adduced at trial or during any hearing, documents produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions, affidavits, declarations, oral or written statements of counsel for or other representatives of a party to or third-party participant in this proceeding, or any other medium) (collectively “Disclosed Privileged Information”).

## **B. Production of Discovery Materials Containing Potentially Privileged Information**

2. Pursuant to Federal Rule of Evidence 502(d), the disclosure of Disclosed Privileged Information shall not be deemed a waiver or impairment of any claim of privilege or protection (including, but not limited to, the attorney-client privilege, the protection afforded to work product materials, and any other privileges and protections) as to such Disclosed Privileged Information, any other communication or information, or the subject matter thereof, either in this case or in any other federal or state proceeding.

3. With respect to Disclosed Privileged Information contained in documents produced in response to requests for production of documents, Paragraph 2 of this Order shall apply only to those of such documents that

- (i) Were produced fewer than 30 days prior to receipt of a Clawback Notice as to such document(s) by the receiving party; or
- (ii) Total less than 50 or 5% (whichever is greater) of the total number of documents produced in the production that included the document(s) covered by the Clawback Notice, regardless of when such production was made.

1           For any Disclosed Privileged Information contained in documents produced in  
 2 response to requests for production of documents that, by reason of Paragraph 3 of this Order, are  
 3 not covered by Paragraph 2 of this Order, the determination as to whether disclosure of such  
 4 Disclosed Privileged Information operated as a waiver of any claim of privilege or protection as  
 5 to such Disclosed Privileged Information or any other information or communication shall be  
 6 governed by Federal Rule of Evidence 502(b) and any other applicable law.

7           4. Nothing contained herein is intended to or shall serve to limit a party's right to  
 8 conduct a review of documents, ESI or information (including metadata) for responsiveness  
 9 and/or segregation of privileged and/or protected information before production.

10          5. The producing party must notify the receiving party promptly, in writing, upon  
 11 discovery that a document has been produced in response to a request for production of  
 12 documents that the producing party believes to contain Disclosed Privileged Information. This  
 13 "Clawback Notice" shall include (i) the bates range of the document(s) in question, (ii) a privilege  
 14 log listing the document(s) in question, and (iii) a new copy of the document(s) in question  
 15 (utilizing the same bates number as the original material) with the Disclosed Privileged  
 16 Information redacted (if the producing party claims that only a portion of the document(s) in  
 17 question contains Disclosed Privileged Information). If the producing party claims that the  
 18 entirety of the document(s) contains or consists of Disclosed Privileged Information, then the  
 19 producing party shall provide a slip sheet bearing the bates range of the document(s) in question,  
 20 noting that the document(s) are subject to a Clawback Notice.

21          6. Upon receipt of a Clawback Notice, the document(s) covered thereby, and all  
 22 copies thereof, shall be sequestered and the receiving party shall not use such document(s) for any  
 23 purpose, except as provided in paragraphs 7 and 8, until further Order of the Court. The receiving  
 24 party shall also attempt, in good faith, to retrieve and sequester all copies of such document(s) in  
 25 electronic format.

26          7. The receiving party may challenge the producing party's assertion by means of a  
 27 Clawback Notice of privilege or other protection as to Disclosed Privileged Information. In order

1 to do so, within seven (7) business days from receipt of the Clawback Notice in question, the  
2 receiving party shall give the producing party a written "Notice of Clawback Challenge"  
3 providing the reason for said challenge. The producing party will have seven (7) business days to  
4 respond to the Notice of Clawback Challenge, in writing, by either: (i) agreeing to withdraw the  
5 challenged claim of privilege or other protection; or (ii) stating the reasons for such claim. If the  
6 producing party's response to the Notice of Clawback Challenge does not resolve the challenge,  
7 the parties shall meet and confer within five (5) business days of the response. If the conference  
8 does not resolve the challenge, within five (5) business days of the conference, the parties shall  
9 submit the challenge to the Court or an assigned Magistrate Judge for resolution. The producing  
10 party retains the burden of establishing the applicability of the claimed privilege or other  
11 protection as to any Disclosed Privileged Information, and the receiving party must not assert as a  
12 ground for upholding the challenge the fact or circumstances of the disclosure of the Disclosed  
13 Privileged Information in question. If the receiving party does not serve a Notice of Clawback  
14 Challenge as provided above with respect to a document covered by a Clawback Notice, then,  
15 upon expiration of the seven (7) business day period, all copies of the document in question shall  
16 be returned or destroyed.

17       8. Nothing in this Order prevents a receiving party from submitting a document  
18 covered by a Clawback Notice to the Court for review or using such a document in briefing  
19 submitted to the Court in connection with any submission of a challenge to a Clawback Notice to  
20 the Court for resolution in accordance with Paragraph 7. Prior to submitting the document(s) in  
21 question to the Court for review and/or using the content of such document(s) in briefing  
22 submitted to the Court pursuant to the preceding sentence, the receiving party must (1) provide  
23 the Court with a factual basis adequate to support a good-faith belief by a reasonable person that  
24 the challenge in question is valid and (2) obtain an order from the Court authorizing the  
25 submission of the document(s) in question to the Court and/or use of the document(s) in question  
26 in briefing submitted to the Court either in camera, under seal, or in some other manner that  
27 protects the confidentiality of such document(s). If any Disclosed Privileged Information is

1 found to be privileged or protected in accordance with the procedures described herein, all copies  
2 of the document(s) containing such information shall be returned or destroyed.

3       9. Any portions of analyses, memoranda or notes that were internally generated by  
4 the receiving party and contain or were based upon the document(s) listed in a Clawback Notice  
5 shall immediately be sequestered by the receiving party and shall be destroyed in the event that  
6 (a) the receiving party does not challenge the Clawback Notice as to such document(s) pursuant  
7 to paragraph 7 above, or (b) the Court rules that the Disclosed Privileged Information in question  
8 is privileged or otherwise protected. Such portions of analyses, memoranda or notes may only be  
9 removed from sequestration and returned to their intended purpose in the event that (a) the  
10 producing party agrees in writing to accept the challenge in question, or (b) the Court rules that  
11 the Disclosed Privileged Information in question is not privileged or otherwise protected.

12       **C. Quick Peek Provision**

13       10. In the event that a producing party notifies a receiving party that it intends to  
14 produce documents in response to a request for production of documents without having reviewed  
15 such documents for privilege or work-product protection (“Quick Peek Production”), the parties  
16 may negotiate separate parameters for such productions and the privilege protections applicable  
17 to documents included in such productions. The provisions of Paragraph 3 of this Order will not  
18 apply to Quick Peek Productions provided that the producing party has a reasonable basis for  
19 utilizing a Quick Peek Production as to the production in question.

20       **D. Prohibition on Use of Disclosed Privileged Information**

21       11. To the extent a party is aware (or it becomes reasonably apparent to such party)  
22 that it has received Disclosed Privileged Information, such information may not be submitted to  
23 the Court (except in connection with a challenge to a Clawback Notice pursuant to Paragraph 7)  
24 or presented for admission into evidence or sought in discovery in this proceeding or in any other  
25 proceeding or action, and such party must immediately notify the producing party of its receipt of  
26 such Disclosed Privileged Information and return, sequester, or destroy such information.

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1           **E. Clawback of Documents Used in Court Filings or Hearings**

2           12. If a receiving party uses in a brief or at a hearing a document produced in response  
 3 to a request for production of documents that the producing party believes contains Disclosed  
 4 Privileged Information, and the producing party has not yet served a Clawback Notice in regard  
 5 to such document, then, notwithstanding any otherwise applicable deadline for doing so in  
 6 Paragraph 3 or Paragraph 5 hereof, if the producing party wishes to seek the protection of  
 7 Paragraph 2 hereof as to such document or otherwise make a claim of privilege or other  
 8 protection as to such document, the producing party shall serve a Clawback Notice as to such  
 9 document within ten (10) business days of the filing of the brief or its receipt of the transcript of  
 10 the hearing in question, and thereafter the procedures set forth in paragraphs 6 through 9 shall  
 11 apply to such Clawback Notice. With respect to any such document that is not made the subject  
 12 of a Clawback Notice as provided in the preceding sentence, the asserted privilege or protection  
 13 will be deemed as waived absent extraordinary circumstances.

14           **F. Use of Documents During Deposition**

15           13. If, during a deposition, a receiving party uses in the deposition (e.g., marks as an  
 16 exhibit, shows to the witness, or makes the subject of examination) a document produced in  
 17 response to a request for production of documents that the producing party believes contains  
 18 Disclosed Privileged Information, the producing party may (a) allow the document to be used  
 19 during the deposition without waiver of any claim of privilege or other protection; (b) instruct the  
 20 witness not to answer questions concerning the parts of the document containing privileged or  
 21 protected material; or (c) object to the use of the document at the deposition to the extent the  
 22 entire document is privilege or protected, in which case no testimony may be taken relating to the  
 23 document during the deposition until the matter is resolved by agreement or by the court. If the  
 24 producing party has not yet served a Clawback Notice in regard to such document, then,  
 25 notwithstanding any otherwise applicable deadline for doing so in Paragraph 3 or Paragraph 5  
 26 hereof, and regardless of which course of action the producing party elected to follow in regard to  
 27 such document pursuant to the first sentence of this Paragraph 13, if the producing party wishes to

1 seek the protection of Paragraph 2 hereof as to such document or otherwise make a claim of  
2 privilege or other protection as to such document, the producing party shall serve a Clawback  
3 Notice as to such document within ten (10) business days of its receipt of the transcript of the  
4 deposition, and thereafter the procedures set forth in paragraphs 6 through 9 shall apply to such  
5 Clawback Notice. With respect to any document that is not made the subject of a Clawback  
6 Notice as provided in the preceding sentence, the asserted privilege or protection will be deemed  
7 as waived absent extraordinary circumstances.

8 **G. Voluntary Waiver Not Precluded**

9 14. This Order does not preclude a party from voluntarily waiving any claims of  
10 privilege or protection in circumstances where this Order, the provisions of Fed. R. Evid. 502,  
11 and otherwise applicable law do not operate to prevent disclosure of Disclosed Privileged  
12 Information from operating a waiver of such privilege or protection.

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14 **IT IS SO STIPULATED, through Counsel of Record.**

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16 Dated: March 12, 2021

**BRADLEY/GROMBACHER, LLP**

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BY: \_\_\_\_\_

KILEY L. GROMBACHER  
ATTORNEYS FOR PLAINTIFFS  
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Dated: March 15, 2021

**ORRICK, HERRINGTON & SUTCLIFFE LLP**

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By: \_\_\_\_\_

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